



PATENT
Case 803P019CPA

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

#22
2-22-01

In re application of)	Examiner: M. Dastouri
)	
Allan S. Hodgson)	Group Art Unit: 2723
Jessica M. Arnold)	
)	
MEASUREMENT OF FRUIT)	
PARTICLES)	
)	
Continued Prosecution)	
Application)	
Serial No.: 08/879,322)	
Filed: June 20, 1997)	

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COMMUNICATION PRIOR TO FIRST OFFICE ACTION IN CPA

Commissioner for Patents
Washington, D. C. 20231

Sir:

Prior to the examination of this Continued Prosecution Application, applicants submit a Supplemental Declaration under Rule 131.

The Advisory Action mailed December 12, 2000 points to alleged contradictory statements in paragraphs 3 and 4 of the prior filed Declaration Under Rule 131 regarding the date of Exhibit "F". In addition, the Advisory Action raises a question regarding the term "matrix".

Firstly, applicants respectfully disagree that paragraphs 3 and 4 of the prior Declaration are contradictory. The fact that

Exhibit "F" is not dated prior to April 17, 1996 is not contradictory to the statement that the invention was made and completed and actually reduced to practice prior to that date. Although the Exhibit "F" is dated after April 17, 1996, this Exhibit "F" was submitted to confirm the structure of the apparatus of the previous reduction to practice. As stated in Paragraph 11 of that prior Declaration, this shows the apparatus of the mock-up cabinet which was reduced to practice prior to April 17, 1996, but in respect of which no sketch could be located. Exhibit "F" is used to illustrate the components of the mock-up.

Applicants have located a further document, attached to the Supplemental Declaration as Exhibit "G". As declared in paragraph 7 of this Supplemental Declaration, Exhibit "G" had not been located at the time of the prior Declaration. This is submitted in order to confirm the previously noted mock-up clearly was in existence and was tested prior to April 17, 1996. More specifically, Exhibit "G" is a Report which evidences that the claimed invention was reduced to practice by applicants' demonstration of its ability to carry out the claimed invention.

The Supplemental Declaration confirms the previous Declaration was not contradictory. The Supplemental Declaration confirms that the mock-up apparatus of the claimed invention

which carried out the method of the claimed invention was reduced to practice, tested and demonstrated before April 17, 1996, irrespective of whether the more formal apparatus of Exhibit "F" was reduced to practice prior to April 17, 1996.

Exhibits "A" through "E" and "G" are supporting statements, prepared prior to April 17, 1996, which are verbal disclosures of the invention. Applicants respectfully refer to MPEP Section 715.07, from which it is clear that sketches or drawings are not required evidence. In this respect, Exhibit "F" is superfluous. It is submitted merely as confirmation of the components of the claimed invention. Same is consistent with the recollections of the declarants, as confirmed by Exhibit "G" which establishes (by a document dated prior to April 17, 1996) the reduction to practice and demonstration of the invention before that date.

Applicants accordingly respectfully request reconsideration and withdrawal of the rejection of claims 1-10 and 12-20 in view of applicants' having invented prior to the filing date of Queisser et al U.S. Patent No. 5,818,953.

Applicants alternatively request reconsideration and withdrawal of the rejection of claims 1-10 and 12-20 from Queisser et al because of the failure of Queisser et al to teach, disclose or suggest an apparatus or method which measures components within a fruit matrix without having to separate the

fruit matrix into its components. Applicants previously provided the Office with various definitions of "matrix" as used by applicants. A fruit matrix is used as a filling or a topping for food products. These uses can include fillings for bakery goods and toppings for pancakes, ice cream and the like.

The enclosed Supplemental Declaration reiterates that this is the definition of "matrix" as used by applicants (and widely in the fruit industry). As stated in paragraph 8 of the Supplemental Declaration, a matrix to which applicants refer in their claims and in the Declarations (including "food particles in a matrix", "fruit matrix" and "a fruit matrix containing fruit particles") is an aqueous, gelled liquid matrix. These matrix products are food toppings or filings which have a continuous phase or matrix which is a sugar matrix, a starch matrix, or a sugar and starch matrix, for example.

Applicants do not dispute the Examiner's observation that Queisser discloses a different type of matrix. The Examiner refers to the Queisser two-dimensional array of food products and points out that this is consistent with certain dictionary definitions of the term matrix. This may be correct, but this does not lead one to the fruit particles in a matrix of applicants' claims.

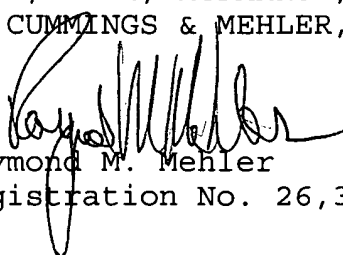
Applicants disagree with the Examiner that the two-dimensional array of food products taught by Queisser is the same as the fruit particles in a matrix which is claimed by applicants. Applicants matrix is not two-dimensional. It is not an array. It is not ordered at all. It is an aqueous, gelled liquid matrix having fruit particles randomly dispersed within this three-dimensional edible product. Simply put, Queisser does not disclose analyzing food particles when they are within a gelled, liquid matrix. Instead, it teaches that food samples such as french fried potatoes are positioned so as to be aligned. See, for example, column 5, lines 21-49.

If applicants were to follow the teachings of Queisser, then the fruit particles would have to be removed from the gelled, liquid matrix, such as by straining and washing. These fruit particles then would be aligned and analyzed. The important advantage of applicants' invention is avoiding the need to remove the fruit particles from the continuous phase (or gelled, liquid matrix) of the filling or topping before it is analyzed. As noted in the beginning of applicants' description, the invention addresses the problems of the "fruit retention test", which required separation of the fruit particles from the matrix.

Applicants have endeavored to place this application into condition for allowance, and favorable consideration is respectfully requested.

Respectfully submitted,

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